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September 3, 2010

VIA FEDERAL EXPRESS
Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

Re: SuperShuttle DFW and Amalgamated Transit Workers Union, Local 1338
Case No. 16-RC-10963

Dear Mr. Heltzer:

In connection with the above-referenced mater, enclosed please find an original and eight (8) copies of SuperShuttle DFW's Statement in Opposition to Amalgamated Transit Union Local 1338's Request for Review (the "Response Brief"), for filing. Please file stamp a copy of the Response Brief and return to the undersigned in the self-addressed, stamped envelope provided herein. Thank you.

Sincerely,

Daniel M. Combs

Daniel M. Combs

DMC:lb
Enclosure
cc: SuperShuttle DFW
Patrick R. Scully, Esq.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUPERSHUTTLE DFW, INC.,
d.b.a. SUPERSHUTTLE DFW

Case 16-RC-10963

Employer,

and

AMALGAMATED TRANSIT UNION LOCAL 1338

Petitioner.

SUPERSHUTTLE DFW, INC.'S STATEMENT IN OPPOSITION TO AMALGAMATED TRANSIT UNION LOCAL 1338'S REQUEST FOR REVIEW

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I. INTRODUCTION

Respondent, SuperShuttle DFW, Inc., d.b.a. SuperShuttle DFW ("SuperShuttle DFW" or "Respondent"), submits this Statement in Opposition to Amalgamated Transit Union Local 1338's ("ATU," the "Union," or "Petitioner") Request for Review ("Opposition Statement"), pursuant to Section 102.67(e) of the National Labor Relations Board's ("Board") Rules and Regulations.

The Union seeks review of the Regional Director's Decision and Order (the "Decision"), dated August 16, 2010, in which Acting Regional Director Ofelia Gonzalez (the "Regional Director") dismissed the Union's Petition based on her finding that the petitioned-for franchisee common-carrier drivers are independent contractors excluded from the Act. (Decision at 12, 22.)[1] Petitioner's Request for Review misrepresents the record in this case in every meaningful respect. Petitioner argues facts that it did not elicit in the record and did not present to the Regional Director.[2] The misstatements of fact, complete with inaccurate purported record citations, are too numerous to recount in this Response. As reflected in the Regional Director's well-reasoned and correct Decision, most of the pertinent facts in this case are undisputed and were conceded by all of *Petitioner*'s witnesses.

Petitioner's evident purpose in such blatant misrepresentation is to convince the Board to simply apply a decision rendered in another Region, involving a totally distinct and separate employer in a market with markedly distinct facts. Such a miscarriage of the Representation Case procedures must not be countenanced, and the other decision, which concerned other parties and was based on a completely different record, is not discussed below. The only facts at

[1] Petitioner did not attach the Decision to its Request for Review. Respondent attaches the Decision as Exhibit A-1 to this Response.

[2] In this and other respects, Petitioner's Request for Review is improper under Board Rules.

issue on this Request for Review are the facts considered by the Regional Director. Under the facts of the instant case, the Regional Director properly applied the relevant case law and rendered the correct decision: the petitioned-for franchisees are independent contractors.

The true record reflects that the drivers who have franchised with SuperShuttle DFW own the instrumentalities of their work, are free to accept or reject all work offered to them, pay a flat fee to SuperShuttle DFW, retain their own revenue, enjoy substantial and significant entrepreneurial freedom, have a finite, one-year contractual relationship with SuperShuttle DFW, exercise complete control over the operation of their own business, and are engaged in a distinct business from SuperShuttle DFW. Contrary to Petitioner's misleading arguments, review of the Regional Director's decision in this case would entail a substantial departure from the long-standing Board and court precedent on this issue. Similarly, Petitioner's secondary argument compels a reversal of the Statute itself—insofar as Petitioner suggests that independent contractors should not be excluded from the definition of "employee."

II. ARGUMENT AND AUTHORITIES

The Union's Request for Review of the Decision has no basis under Board Rules 102.67(c)(1), (2), and (4). The Union bases its Request for Review on gross misrepresentations of the record and the Regional Director's findings and legal holdings, and an obstinate resistance to acknowledge undisputed record evidence. As discussed below, the Regional Director made no erroneous factual findings and the Regional Director based the Decision on a binding, long-established body of precedent.

A. The Union Misstates the Record and the Regional Director's Decision.

Petitioner introduced virtually no evidence of purported "control" at the Hearing. In its Request for Review, Petitioner seizes on particular elements of the UFA that are undisputedly

regulatory in nature. The Union further attempts to conceal the overwhelming evidence of franchisees' freedom and discretion to conduct their business in the manner they see fit.

1. Petitioner Disregards Regulation of Shared-Ride Transportation Services.

Petitioner refuses to acknowledge the pervasive regulations governing the franchisees' shared-ride transportation service. Regulations impact nearly every aspect of the franchisees' business, and are the source of the purported "controls" on which Petitioner bases its Request for Review. (Decision at 11; see also E. Ex. 1); Don Bass Trucking, Inc., 275 NLRB 1172, 1174 (1985) ("Government regulations constitute supervision not by the employer but by the state").

The Regional Director considered the regulatory nature of certain controls when analyzing the manner in which franchisees do business and the lack of SuperShuttle DFW's control over the details of franchisees' work. (See Decision at 11.) The Dallas/Fort Worth International Airport Board (the "DFW Board") is the primary, but not the only, source of regulation.[3] The DFW Board, a public authority, promulgates rules and regulations to providers of shared-ride services via a shared-ride airport contract (the "Airport Regulations").[4] (E. Ex. 1; Tr. 20:11–18, 22:4–10.; see Decision at 11.)

These Regulations are not merely an immaterial annoyance that Petitioner may attempt to circumvent; rather, the Regulations are part-and-parcel of the shared-ride services industry to and from one of the top-ten busiest airports in the world. Any implication to the contrary—such as a

[3] The Dallas City Code, the Forth Worth City Code and Charter, the Texas Transportation Code (Tex. Transp. Code Ann. § 545.425 (2010)), and regulations of the United States Department of Transportation also govern the petitioned-for franchisees. (See E. Ex. 1 at 29 § 9.1.)

[4] The Board's Vice President of Operations ("Board VP") also has authority to promulgate regulations. (See, e.g., E. Ex. 1 at § 4.1.17.) The Board VP is an employee of the Airport Board and is the Board's liaison for purposes of the Airport Board/SuperShuttle DFW contract and for compliance with Airport Regulations. (See E. Ex. 1 at 8 § 2.4, 9 § 4.)

complete failure to acknowledge the Regulations—is a disingenuous attempt to mislead the Board.

The Airport Regulations, which are 130 pages in length, are too numerous and expansive to set forth in this Response Brief. (Tr. 22:3–7; E. Ex. 1.) However, in the Request for Review Petitioner improperly attempts to rely on the following Regulations, erroneously arguing they are evidence of employer control:

(a) *Regulation Requiring Dressing in Uniforms.* Contrary to the Union's assertion (Request for Review at 2, 6), franchisees wear uniforms pursuant to regulatory mandate. (Contract, E. Ex. 1, § 2.6.)[5] The Airport Regulations set standards as to franchisees' appearance, and require franchisees to be "clean, neat in appearance, [and] uniformly attired." (Contract § 2.6.) The Airport Board places utmost importance on the tailored appearance of shared-ride drivers, as demonstrated by the fact that the very definition of "Shared-Ride Service" references dressing in uniforms:

> the business of offering transportation for hire by a van-type service on an on-demand or pre-arranged basis in which the entire service area is covered; a minimum fleet size of twenty-five van-type vehicles are maintained; *all drivers are dressed in a uniform or item of apparel that clearly distinguishes them as an . . . independent contractor* . . . a twenty-four hour, seven day per week dispatching/reservation system is maintained; a two-way communication system is maintained at all time.

(Id. § 1.1.32 (emphasis added).)

(b) *Training Regulations.* Petitioner's improperly attribute training requirements to SuperShuttle DFW. (Request for Review at 7.) Pursuant to Airport Regulations, franchisees must comply with and receive training on vehicle requirement and permitting

[5] Petitioner's argument concerning uniforms has no basis in Rule 102.67(c)(2), given that the Regional Director actually found that the requirement of uniforms tended to show control by SuperShuttle DFW.

procedures, daily loading area and vehicle inspecting standards, customer service standards, lost article reporting procedures, and maintenance of a driver daily manifest, and must complete a defensive driving course. (E. Ex. 1 at 48–49; 21 § 4.3.14; Tr. 27:24–28:6.) It is undisputed that pursuant to the Airport Regulations, SuperShuttle DFW assumes responsibility for training franchisees. (Id.)

(c) *Insurance Regulations.* Petitioner erroneously mischaracterizes the insurance requirement on franchisees by omitting the Airport Regulations' insurance directives. (Request for Review at 6.) Rather, the Airport Regulations require SuperShuttle DFW to "procure and keep in full force automobile liability insurance that meets or exceeds" standards set forth in the Airport Regulations. (E. Ex. 1 at 33 § 14.1.) Pursuant to Airport Regulations, insurance procured by SuperShuttle DFW must cover all vehicles, "whether owned or not owned by [SuperShuttle DFW], operated under the [Airport Contract]." (Id. § 14.2.) Simply put, the manner, means, and amount of franchisees' insurance coverage is directly attributed to explicit Airport Regulations. Petitioner's assertion that SuperShuttle DFW single-handedly sets forth insurance requirements is false.

(d) *Vehicle Inspection Regulations.* Petitioner incorrectly attributes inspection requirements to SuperShuttle DFW, rather than the Airport Regulations. Pursuant to Airport Regulations, franchisees must submit their van to inspection, must pass inspection, and must get an authorization decal. (Id. at 24–26 §§ 4.6.5.–4.6.6, 4.6.14.) Franchisees also must make their vans available for inspection when ordered by the DFW Board Vice President. (Id. at 24–25 §§ 4.6.5.–4.6.6.) The Airport Regulations also prohibit SuperShuttle DFW from allowing a franchisee from operating a van if the franchisee is not in compliance with the Airport

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(Decision at 15.) The Regional Director discussed uniforms after stating that "drivers are not free in all details of the work." (Id.)

Regulations concerning, among other things, the condition and appearance of the vehicle. (Id. at 12 § 4.1.14.)

(e) *Regulation of Vehicle Equipment, Age, Markings, and Appearance.*

Petitioner also incorrectly attributes van equipment and appearance standards to SuperShuttle DFW, rather than the Airport Regulations. (Request for Review at 6.) Pursuant to the Airport Regulations, the DFW Board Vice President has set forth standards concerning safety and the condition, age, size, and appearance of shared-ride vans, and equipment, signs, and markings on shared-ride vans. (E. Ex. 1 at 24 § 4.6.2.; id. at 58–65.) Among other regulations, shared ride vans must not exceed a certain age (id. at 58); all vans must "have a common color scheme that is unique to [SuperShuttle DFW's] fleet and distinctive from all other permitted transportation service at [the Airport] and is approved by [the DFW Board VP]" (id. at 59); all vans must have the company name and telephone permanently affixed to both sides of the van, in specific-sized lettering (id.; Tr. 29:19–21); and vans must have specific interior equipment, such as an air conditioner, heater, fire extinguisher, proof of insurance, a credit card machine, and at least 1/4 tank of gasoline. (E. Ex. 1 at 60.) The Airport Regulations also limit the number and size of dents a van may have, and describe in detail the required condition and cleanliness of interior and exterior surfaces. (Id. at 60–62; Tr. 29:22–23.)

The specifications concerning vans directly correlate to Airport Regulations and are not evidence of control. Don Bass, 275 NLRB at 1174 ("Government regulations constitute supervision not by the employer but by the state"). Petitioner's failure to acknowledge the detailed regulation over the appearance and condition of vans, and the type of vans used (Request for Review at 5–6), is a disingenuous effort to have the Board review the Decision based on a grossly inaccurate representation of the record.

2. Franchisees Are Not Disciplined and Are Not Subject to Discipline.

The undisputed record evidence demonstrates that franchisees are not subject to discipline and have at no time been disciplined by SuperShuttle DFW. Petitioner's unsupported assertion that franchisees are "subject to an extraordinary amount of discipline by Respondent" contradicts the undisputed record. (Request for Review at 8.) Petitioner's reliance on argument that was *never* supported by evidence before the Regional Director must be rejected.

Witnesses for Respondent and Petitioner confirmed that SuperShuttle DFW does not discipline franchisees. (Id. 108:13–15, 148:12–15.) Franchisee Gideon Okwena testified that he had ever been disciplined or received a write-up, and that SuperShuttle DFW had never suspended him. (Id. 148:12–15.) Union witness Herb Corpany also testified that as a franchisee he had never been subject to discipline by SuperShuttle DFW. (Id. 264:24–265:1.)

Petitioner points to two provisions in the UFA in a misplaced attempt to show "discipline" (Request for Review at 8): (1) a non-implemented provision permitting SuperShuttle DFW to institute a point system to track noncompliance with governing regulations (Ex. 2 at 12 § 4(E)(5)), and (2) the UFA provision whereby setting forth which contract breaches may be cured and which subject the agreement to immediate termination. (Id. at 20 § 11.) Petitioner did not elicit testimony or produce documentary evidence as to how, or whether, SuperShuttle DFW applies these provisions. Petitioner's characterization of the provisions as "discipline" conflicts with the undisputed record evidence, particularly, the testimony of all franchisees.

The Regional Director properly found that the "point system" did not warrant a finding that SuperShuttle DFW controlled the manner and means by which drivers conducted their business, as "no testimony was presented that the point system has been utilized." (Decision at 13–14.) Indeed, it is undisputed that SuperShuttle DFW *does not* use the point system, and both

Respondent's and Petitioner's franchisee witnesses testified that they were not subject to discipline. (Tr. 148:12–15, 264:24–265:1.)

The UFA's contract termination provisions do not evidence discipline for a separate reason—the provisions simply set forth the conditions under which a party may breach the terms of their bargain. (E. Ex. 2 at 20 § 11.) The UFA is a business contract—more specifically, it is a commercial franchise agreement that is drafted in compliance with FTC regulations. (Id. 35:25–36:6); 16 C.F.R. § 436.1. Like any such agreement, the UFA is capable of being breached. (Id. at 20–23 § 11.) The UFA sets forth which breaches may be cured and which subject the agreement to immediate termination. (Id. at 20 § 11.) Controversies between the parties are subject to an arbitration provision, which may be invoked by either party. (Id. at 31.)

Petitioner's mischaracterization of contract breaches as "discipline" is merely the Union's obstinate refusal to acknowledge the business relationship between the franchisees and SuperShuttle DFW. The Union's mischaracterization is defeated by the explicit language of the UFA, and betrays the clear intent of the franchisee entrepreneurs who choose to contract with SuperShuttle DFW as independent contractors, not as employees. As significant, Petitioner offered no evidence on this issue.

3. Franchisees Control Their Own Business Operations.

In its Request for Review, Petitioner thoroughly misrepresents the record evidence concerning franchisees' business operations. Under the outrageously inaccurate heading, "Assignments" (Request for Review at 7), Petitioner brutalizes the undisputed record concerning franchisees' self-scheduling and unhindered discretion to accept or decline business.

Petitioner refers to franchisees' "assigned routes and times" (Request for Review at 7), which are terms and concepts that do not appear in the record. Given Petitioner's failure to attach the Decision, Petitioners' argument is nearly fraudulent. Petitioner falsely asserts that a

franchisee "must accept any trip the Dispatcher tells him or her to take from DFW or face a $50 fine. (Tr. 236–37)" (Request for Review at 7); that "Drivers actually have little autonomy on many trips" (Request for Review at 8); and that SuperShuttle DFW "will 'auto-assign'" routes. (Id.) A review of the Decision based on these false assertions is not warranted.

All franchisee witnesses who testified at the Hearing provided compelling evidence of their complete discretion to select their fares and trips. Franchisees run their business through the discretionary process of bidding on, declining, or passing on trips made available on SuperShuttle DFW's automated dispatch system. (Tr. 54:5–55:3.) Potential trips are displayed on a Nextel device that is roughly the size and shape of a cell phone. (Id. 54:5–55:3, 121:15–19.) Franchisees communicate whether they accept or decline a trip by pressing the appropriate button on the Nextel. (Id. 58:16–24.) Franchisees also may do nothing, and the next available trip will display for bidding. (Id. 58:25–29:4.)

The Regional Director described in detail the four ways in which a franchisee may bid on trips. (Decision at 7–8.) In each type of bidding, a franchisee has the sole discretion to accept, decline, or pass on a trip made available on the Nextel device. (Id. 57:12–22; 121:25–122:22; Decision at 7–8.) If a franchisee does not bid on a trip, there are no consequences; the trip is simply offered to another franchisee. (Decision at 7–8; Tr. 58:25–59:4.)

As entrepreneurs, franchisees have every incentive to bid on and take as many fares as possible. Franchisees pay a weekly flat fee to SuperShuttle DFW as part of the franchise arrangement, and do not share revenues with SuperShuttle DFW. (Decision at 5, 21; Ex. 1 at 1 § A, 3 § 1; Tr. 159:9–23.) The more trips a franchisee takes, the more money the franchisee will make for his or her business. (See Tr. 159:9–23.) The Regional Director found that a franchisee makes a decision whether to bid or pass on a trip based on factors such as the amount of the fare,

whether there are other trips in the area, and the final destination of the trip. (Decision at 7.) This finding reflects the testimony of all franchisee witnesses, who confirmed they choose whether to take fares with the ultimate goal of maximizing revenue for their business, and considering a trip's revenue, the cost of gas, and the miles traveled. (See Tr. 301:13–302:12.)

The Regional Director's finding that "[g]enerally, a driver has no negative consequences for passing a trip" is undisputed in the record. (Decision at 9; Tr. 123:25.) The lack of negative consequences was confirmed by, among other things, the May 2010 bidding history of franchisee and Union witness Herb Corpany. (E. Ex. 5; Tr. 243:11–244:12, 245:2–3.)[6] Mr. Corpany agreed that he passed on numerous bids and that his choices resulted in absolutely no consequences to him. (Tr. 244:11–244:12.) Additionally, Mr. Okwena testified that he chooses the trips he wants, and declines any trips he does not want, without consequences to him from SuperShuttle DFW. (Id. 121:18–122:1.) Mr. Okwena testified that he has complete discretion to decline a bid, and that he makes these choices based on "commonsense" business considerations. (Id. 121:25–122:19.)

> Say, for example, I see 150 [dollars], but it's someone in Plano or McKinney, and there is $40 [two] miles from my house or from my location at that point. I'd rather go for two miles for $40 than jumping from 150 [dollars] . . . in Plano, which [would] consume my time and gas. So I always choose what is good for me.

(Id. 122:19–24.)

Petitioner's assertion a franchisee is "subject to a fine" unless he or she "work[s] [his or her] assigned routes and times" is an outlandish mischaracterization of testimony elicited from Mr. Corpany that on one occasion approximately one-and-one-half years ago, the automatic dispatch system "forced" a trip into his Nextel, which effectively caused him to involuntarily

[6] Mr. Corpany acknowledged the accuracy of E. Ex. 5. (Tr. 245:2–3.)

accept a bid. (Tr. 238:24–239:17, 244:20–23.) According to Mr. Corpany, this forced bid has had a chilling effect on his bidding decisions and he "just [doesn't] decline [bids] . . . for . . . the most part." (Tr. 239:24–240:12.) Mr. Corpany's testimony was directly contracted by his later admissions that his bidding history was accurate and that he repeatedly declined and passed on bids with absolutely no consequence to him. (Tr. 243:15–244:12; E. Ex. 5.) The Union presented no evidence corroborating Mr. Corpany's claim to a "forced" trip. Even if Mr. Corpany's claim could be considered, it is admittedly one incident in the face of overwhelming evidence that franchisees are completely free to accept or decline work. (See Tr. 243:15–244:12; E. Ex. 5.) Indeed, the Regional Director found that "[o]nly one driver that he had found a trip forced into his Nextel device even though he had not accepted the trip. This occurred over one year ago and is the only reference in the record to a 'forced bid.'" (Decision at 7.)

Finally, Petitioner's argument that franchisees' use of the Nextel devices evidences control is not persuasive. (Request for Review at 6.) SuperShuttle DFW's development of and provision of the Nextel devices are incentives causing potential franchisees to enter into agreements with SuperShuttle DFW. Regular cell phones do not interactively display the names, locations, and fares for potential passengers. Use of Nextel devices is a benefit that franchisees enjoy from their bargain.

4. Entrepreneurial Freedom and Self-Scheduling.

In her decision, the Regional Director found that the entrepreneurial opportunity for gain or loss factor "strongly favor[ed] finding that the drivers are independent contractors because the drivers' decisions and efforts impact their income, which provides them with opportunity to gain as well as to lose." (Decision at 20.) The facts on which the Regional Decision relied are undisputed and compelling. Unlike a traditional employment relationship, franchisees determine their own income and are not guaranteed any revenue. (Tr. 117:11–14, 263:13–19; Decision at

20.) Factoring in gas, car payments, maintenance, licensing fees, tolls, and other costs, operating a franchise carries the risk of a loss. (Decision at 20.) As demonstrated in part by Mr. Okwena's testimony, *supra*, franchisees make calculated choices in the trips they take, with the goal of increasing profits. (Id. at 21; Tr. 122:17–24.)[7] Franchisees' actual earnings vary significantly (Decision at 21.) Franchisees have the entrepreneurial freedom to hire and use relief drivers to assist in operating their businesses, and have done so to keep vans in operation during more hours of the day and generate more revenue for the franchise. (E. Ex. 2 at 10 § 4.C; Tr. 50:14–16, 192:17–193:18, 196:11–197:12; Decision at 21.) Additionally, several franchisees working with SuperShuttle DFW are incorporated business entities. (Franchisee List, E. Ex. 4; Tr. 48:13–49:5, 49:12–50:4; Decision at 19).[8]

It also is undisputed that franchisees self-schedule in every meaningful respect. (Tr. 223:19–24, 247:11–16.) Franchisees do not punch in and punch out, can work at any time during the day or night (id. 247:8–19), and may choose to work any day, or any part of any day, that he or she chooses. (Id. 116:23–117:2.) In the Regional Director words, a franchisee "is under no obligation to work any certain days or hours, or even to work at all." (Decision at 6.)[9]

Petitioner asks the Board to review the Decision based on a UFA provision not mentioned or relied upon in the Hearing—namely, the franchisees' agreement that affiliating with, acquiring an interest in, or becoming an employee of business competitors of SuperShuttle DFW while a party to the UFA is a material breach of the UFA. (E. Ex. 2 at 22.) The provision serves to protect SuperShuttle DFW's proprietary and competitive interests

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[7] Again, there are no consequences to franchisees for declining a bid other than not receiving that fare. (Tr. 123:25.)

[8] It also is undisputed that the franchisees file taxes for themselves and report themselves as "self-employed," and take business-related deductions. (Tr. 144:13–17, 213:18–24, 262:16–25).

[9] The undisputed record further disclosed that franchisees self-schedule and self-govern the "hotel circuit" with absolutely no input from SuperShuttel DFW. (Tr. 64:12–23, 124:15–125:4; Decision at 8.)

(indeed, the provision is set forth with the confidentiality and trade use provision), and is not a limitation on entrepreneurialism or evidence of "control."

Petitioner also focuses on contractual provisions concerning charters, which, again, were not addressed or relied upon in the Hearing. (Request for Review at 9.) These provisions undisputedly do not restrict a franchisees unfettered decision to take charters in order to increase revenue for his or her franchise.

Petitioner improperly argues that regulatory-based requirements over who may be a relief driver—which are identical to regulations governing franchisees—somehow negates the entrepreneurial opportunities presented by the ability to use a relief driver. (Request for Review at 10.) The Airport Regulations require SuperShuttle DFW to ensure that all shared-ride drivers associating with SuperShuttle DFW (which of course includes relief drivers) are screened for the presence of drugs and alcohol before submitting a permit application. (Id. at 17 § 4.3.2.2; Tr. 26:18–27:9.) The Airport Regulations provide a written drug and alcohol testing procedure. (E. Ex. 1 at 17, 70.) Similarly, the Airport Regulations allow only those with a valid permit to operate a shared-ride vehicle. (Id. at 16 § 4.3.1.1.) One condition precedent for a permit is submission to a criminal history background check, which must be performed by SuperShuttle DFW. (Id. at 17 § 4.3.2.1.) The Regulations of course apply to relief drivers and have no effect on whether a franchisee, in his or her complete discretion, decides whether to hire and use relief drivers to assist in operating their businesses.

Finally, the Union argues that contractual guidelines concerning the transfer of the UFA somehow warrants review of the Decision. (Request for Review at 11–12.) This argument is misplaced, particularly because the Regional Director's findings of fact referenced the specific transfer provisions, and because she did not base the Decision on the transfer provisions. The

existence of the transfer provision is at best a neutral factor within the entrepreneurial element of the common law test (which overwhelmingly weighed in favor of independent contractor status), and does not provide grounds for review under Rule 102.67. Moreover, Petitioner's conclusory assertion that "it would be virtually impossible for a Driver to transfer his UFA to someone else" is not supported by any evidence. (See id. at 11–12.) On the contrary, the parties agree to follow detailed standards regarding transfers (E. Ex. 2 § 13.B), and the detailed provisions permit a conflict-free transfer ensuring that a transferee is in compliance with Regulations. (Id.) To call the transfer "impossible" misstates the provisions to which both parties agree.

5. Petitioner Mischaracterizes the UFA and "Driver Manual."

The Petitioner gives a woefully inaccurate description of the UFA in its Request for Review of the Decision. (Request for Review at 4–5.) The UFA sets forth the franchisees' business relationship with SuperShuttle DFW (E. Ex. 2; Tr. 36:20–24), and memorializes the business quid pro quo between the parties: in exchange for a franchisee's payment to SuperShuttle DFW of an initial franchisee fee and a flat weekly system fee, the franchisee obtains a one-year, non-exclusive right to provide shared-ride services using a van in the Dallas-Fort Worth area using SuperShuttle DFW's proprietary reservation and automatic dispatching systems and intellectual property, including but not limited to the "SuperShuttle" trademark and the yellow and blue color scheme. (Id. at 1 § A, 3 § 1; Tr. 159:9–23.) Both parties must adhere to the terms of the UFA as part of the quid pro quo. (See id. § 3 § 1.)

Franchisees and SuperShuttle DFW both choose to contract with one another in the franchise relationship, and Petitioner's argument that the UFA is somehow forced upon franchisees is unfounded. (Request for Review at 4–5.) Petitioner makes an inaccurate record citation to support the assertion that "[t]here is no evidence that prospective drivers are permitted

to negotiate over any of the terms in the UFA." (Request for Review at 4.)[10] In fact, no testimony was elicited, and no documentary evidence was offered, showing that franchisees may not negotiate over terms in the UFA.

Petitioner's attempts to find "controls" in plain terms of the franchise quid pro quo are also misplaced. Thus, Petitioner's assertion that "[t]here is no evidence that any driver has ever operated more than the one van listed in the Disclosure Document" is inaccurate and misleading; no evidence was presented whatsoever as to the number of vans driven, so no conclusion on that issue can be reached. (See Request for Review at 4.) The assertion is also legally unimportant for purposes of an independent contractor determination, as the number of vans a franchisee *agrees* to operate is not evidence of control, but rather sets the parameters of the commercial bargain, much like a franchisee of a fast food restaurant chain might agree to operate one restaurant in exchange for a set fee. However, nothing in the UFA prohibits a franchisee from entering into multiple UFAs with SuperShuttle DFW, thereby operating multiple vans.

Petitioner also asks the Board to review the Decision based on a Unit Franchise Operations Manual ("Unit Manual") that was not introduced at the Hearing and is not part of the record. (Request for Review at 5–6.) Petitioner states that franchisees are "required to follow procedures outlined" in the Unit Manual (id. at 5), yet elicited no evidence as to the contents of the Unit Manual. In fact, General Manager Harcrow provided all evidence concerning the Unit Manual and testified that the Unit Manual contains a brief overlay of the UFA. (Tr. 77:18–78:9.) Petitioner's insinuation that any elements of control existing in the Unit Manual is unsupported and is no basis for review of the Decision.

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[10] Petitioner cites to a franchisee's testimony that the UFA is "a standard agreement" (Request for Review at 4 (citing Tr. 205–206)), which in no way supports the proposition that franchisees are not permitted to negotiate over the terms of a UFA.

6. Cell Phone Use Policy.

Petitioner asks the Board to review the Decision based on a "Cellular Device usage Policy" issued to franchisees. (Tr. 91:1–9; U. Ex. 1; Request for Review at 7.) The request by SuperShuttle DFW that franchisees limit use of cell phones is regulatory in nature and is by no means a *significant* control over the manner and means of franchisees' business warranting review of the Decision. (Decision at 15–16.) Contrary to Petitioner's assertion (Request for Review at 7), the cell phone use policy stems from legal requirements. The Texas legislature has imposed a partial ban on cell phone use while driving. Tex. Transp. Code Ann. § 545.425 (2010) (prohibiting use of hand-held cell phones in a school crossing zone, and prohibiting operator of a passenger bus from using a hand-held device while a minor passenger is on board). The policy at issue is not only regulatory in nature, the record is devoid of evidence that the policy has ever been used in a punitive manner. In fact, the policy has had no punitive effect on franchisees whatsoever.

B. The Union Asks the Board to Review the Decision in Order To Overrule Board Precedent.

1. The Regional Director Properly Applied Board Precedent.

The Regional Director's correct legal analysis is not properly subject to Board review under Section 102.67. The Regional Director found the petitioned-for franchisees to be independent contractors based on the common law agency definition of "independent contractors," as set forth in the Restatement (Second) of Agency § 220(2), which undisputedly is the test applied by the Board in independent contractor/employee determinations. (Decision at 12–13.) The test requires a fact-finder to consider the following factors:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is part of the regular part of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

Arizona Republic, 349 NLRB 1040, 1042 (2007) (citing Roadway Package, 326 NLRB at 842); (Decision at 13).

Based on a careful application of the record evidence to the common law factors, the Regional Director found that

> the weight of evidence favors a finding that the drivers herein are independent contractors. Similar to the taxicab industry, significant factors herein include the lack of control exerted by the Employer and the lack of sharing of fares. AAA Cab Service, 341 NLRB at 465. Here, drivers do not share their fares with the Employer and drivers operate their vehicles with little Employer control. Additionally, significant weight is given to the belief and intent of the parties in entering into relationships, and that factor clearly favors a finding of independent contractor status. Finally, I find that the drivers' ownership of their vehicles as well as their opportunities for loss and gain are significant factors in establishing that drivers are independent contractors.

(Decision at 21–22.) The Regional Director's analysis and holding is soundly based in Board precedent.

The Regional Director looked in part to decisions in the taxicab and limousine industry in making her Decision. (Decision at 21–22.) Like taxicab drivers, franchisees in the instant case determine the amount of income they earn by virtue of the hours they choose to operate their business and fares they choose to take. (Id. 117:18–22); see Ace Cab Company, 273 NLRB

1492–93 (1985) (analyzing earnings model for taxicab drivers). These facts lend themselves to the analysis of the Board's taxicab and limousine decisions, which similarly compel a finding that the franchisees are independent contractors. See Ace Cab Company, 273 NLRB at 1493; Air Transit III, 271 NLRB 1108, 1111 (1984). Petitioner's Request does not address this well-settled precedent.

In AAA Cab Services and Independent Taxi Drivers Union, 341 NLRB at 463, 465 (2004), the Board applied the common law agency test to find that taxicab drivers using a company's automatic dispatch system were independent contractors. Id. The drivers in AAA Cab Services, like the franchisees in the instant case, entered into agreements with a company to gain access and use of dispatching service, id., undergo initial training, id., and provide transportation to customers to and from the airport and other locations. Id. The drivers were subject to heavy government regulation. Id. at 464. Like SuperShuttle DFW in the instant case, the taxi company in AAA Cab Services did not pay wages to the independent drivers and the drivers were responsible for withholding taxes. Id. Similarly, the drivers paid their own business-related expenses, such as gas. Id. In AAA Cab Services, the drivers used the contracted-for automatic dispatch services at their sole discretion, and could "reject a call by pressing a button on the display . . . . for any reason without penalty." Id. Indeed, as in the instant case, when a call was "rejected, the computer repeat[ed] the process with other drivers until someone accept[ed] the call by pressing an accept button on the display." Id.[11] See also Ace Cab Company, 273 NLRB at 1492–93 (finding drivers to be independent contractors where

[11] Drivers in AAA Cab Services who accepted a call but failed to service it were subject to a fine by the taxi company. AAA Cab Services, 341 NLRB at 463. The Board has held that a company requirement "that drivers service a dispatch once they accept it" does not preclude the finding of independent contractor status. Id. at 465 (citing City Cab Co. of Orlando, 285 NLRB 1181, 1194 (1987)). In the instant case, regulations require franchisees to service fares that have been accepted.

the drivers paid a monthly fee to use the company's trade dress and dispatching services, and the drivers were not compensated by the company, but instead determined their income by choosing their fares, and where the drivers were controlled only by insurance and city regulations).

In AAA Cab Services, 341 NLRB at 465, the Board also reiterated the axiom that "governmentally imposed rules such as those associated with the posting of fares do not evince the level of control by an employer to preclude independent contractor status." See also Don Bass Trucking, Inc., 275 NLRB at 1174 ("Government regulations constitute supervision not by the employer but by the state"); Air Transit, Inc. v. NLRB, 679 F.2d 1095, 1100 (4th Cir. 1982) (stating that "requiring drivers to obey the law is no more control . . . than would be a routine insistence upon lawfulness of the conduct of those persons with whom one does business"). The Board and federal courts have consistently and repeatedly applied this rule of law in every industry, including shared-ride and transportation industries, in which an employee/independent contractor determination has been requested.

In the instant case, Petitioner ignores this rule of law and, as set forth above, does not disclose its purported "rules" are explicit public authority regulations. In applying the heavily fact-intensive common law agency test, Petitioner also fails to acknowledge that regulations vary from industry-to-industry and from place-to-place. Thus, Petitioner improperly relies on Roadway Package System, Inc., 326 NLRB 842, to support the argument that clothing and appearance requirements are evidence of control. (Request for Review at 15.) Roadway Package System cannot support this particular point in the instant case, where the uniform and appearance rules are undisputedly regulatory in nature. (Contract, E. Ex. 1, §§ 2.6, 1.1.3.2.) Similarly, Petitioner improperly relies on Slay Transportation Co., 331 NLRB 1292, 1294 (2000), for the proposition that displaying a company logo on a vehicle is evidence of control.

(Request for Review at 15.) In the instant case, the Airport Regulations explicitly require markings—including the display of company logos—on shared ride vans, and the requirement does not evidence control as a matter of law. (E. Ex. 1 at 24 § 4.6.2.; id. at 58–65.) A review of the Decision based on such dubious misapplication of Board law is improper.

2. Petitioner's Request for Review Is Based on Mischaracterizations of the Record and Board Precedent.

Petitioner's Request for Review relies wholly on mischaracterizations of the record, as set forth above, and of established Board precedent. Petitioner first asks the Board to review the Decision because Respondent allegedly "offers Drivers what is essentially a take it or leave it proposition." (Request for Review at 14.) Petitioner again argues facts that were not elicited in the record and are not presented to the Regional Director, and makes an unexplainable citation to the transcript. (Id.) Petitioner cites to the transcript at pages "205–206," in which franchisee John Butler testified that the UFA is a "standard agreement." (Tr. 205:24–206:4.) This testimony cannot support the assertion that franchisees do not negotiate over terms of the UFA. Perhaps more importantly, control over drivers is not demonstrated by the fact that a company may set standardized terms in an agreement. AAA Cab Services, 341 NLRB at 465. Rather, this fact, where it exists, is "indicative only of the parties' relative bargaining power and [was] *irrelevant to the issue of control in determining the status of drivers* regarding whether they [were] employees or independent contractors." Id. (emphasis added).

Next, Petitioner disingenuously argues that the "instrumentalities" element does not weigh in favor of independent contractors where all franchisees agree to purchase or lease a van that conforms to regulatory specifications, [12] (E. Ex. 2 at 4 § 2.A.), where sixty-four percent of

[12] As stated above, the Airport Regulations set forth numerous provisions concerning shared-ride vehicles, including: the age of vans, the distinct common color scheme and lettering of vans, the size and number

franchisees own their vans and the remaining lease-to-own (Tr. 66:19–23), and where the investment in the van is significant, averaging between $15,000 and $30,000. (Tr. 67:24–25; Decision at 5.) Board precedent requires that this factor weigh in favor of independent contractor status. In Argix Direct, on which the Regional Director relied, the Board found that the drivers had a significant proprietary interest in the instruments of their work where the truck drivers personally owned or leased their trucks, but where the company supplied the drivers with items such as two-way radios and scanner guns, and the company paid the drivers' tolls and parking tickets. Id. at 1020, 1022. This factor in fact is far more compelling in the instant case than in AAA Cab Services, 341 NLRB at 465, where very few drivers owned vehicles outright, but the drivers paid leases or rental fees over time. Id. at 464; (Decision at 18.) Petitioner's argument that leases, as opposed to ownership, do not evince control over an instrumentality, is inconsistent with Board precedent and relevant state law. Leasing is a form of ownership, see Tex. Transp. Code Ann. § 601.002(9) (defining "owner" to include a lessee), and the Board has held that "paying lease or rental fees over a period of time results in a substantial investment on the part of a lessee." AAA Cab, 341 NLRB at 465.

3. Petitioner's Request That the Board Rewrite Legislation Is Misplaced.

Finally, Petitioner's request that the Board review the Decision in order to reverse the Statute's exclusion of independent contractors from the definition of "employee" is baseless. (Request for Review at 12–13.) Petitioner asserts that "compelling reasons" exist "for reconsideration of an important Board policy of protecting individuals who wish to collectively bargain with business which attempt to bypass the NLRA laws by setting up independent contractor franchise agreements." (Id. at 12–13.) Petitioner's argument is absurd; it asks the

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of seats, requisite interior equipment, and the condition and cleanliness of all surfaces. (E. Ex. 1 at 58–59.)

Board to review the Decision with the goal of replacing the plain language of the Act, and decades of Board and federal court precedent, with a results-oriented test that disregards workers' actual independent contractor when workers "wish to collectively bargain." (Id. at 13.)

Section 2(3) of the Act cannot simply be discarded by the Board for any reason, let alone based on the Union's assertions of fairness. It is black-letter law that "the line between worker and independent contractor is jurisdictional—the Board has no authority over independent contractors." FedEx, 493 F.3d at 496 (quoting North American Van Lines, Inc. v. NLRB, 896 F.2d 596, 599 (D.C. Cir. 1989)). It also is settled that the Board applies a specific test reflecting clear congressional will: it must make a fact-intensive, case-specific inquiry applying the record of the case to several non-exhaustive common law factors. See Argix Direct, Inc., 343 NLRB 1017, 1020 (2004); Arizona Republic, 349 NLRB 1040, 1042 (2007). The fact-intensive test, as set forth in the Restatement (Second) of Agency § 220(2), requires an analysis of non-exclusive and non-exhaustive factors. Arizona Republic, 349 NLRB at 1042. If the Board determines that workers are independent contractors under the test, the Board lacks jurisdiction over a petition pursuant to Section 2(3)—regardless of the workers' desires.

The Board and the Supreme Court of the United States both apply the common law of agency to determine employee and independent contractor status, because the common law of agency "reflects clear congressional will." FedEx Home Delivery v. NLRB, 563 F.3d 492, 495–96 (D.C. Cir. 2009); St. Joseph News Press, 345 NLRB 474, 478 (2005). The Board in St. Joseph News Press explained that "Supreme Court precedent 'teaches us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*'" Id. (emphasis in original) (quoting Dial-A-Mattress Operating Corp., 326 NLRB 884, 894 (1998)). Petitioner's cynical request to bypass the common law test where

workers want to collectively bargain is a brazen request for the Board to amend the Act. The request must be denied.

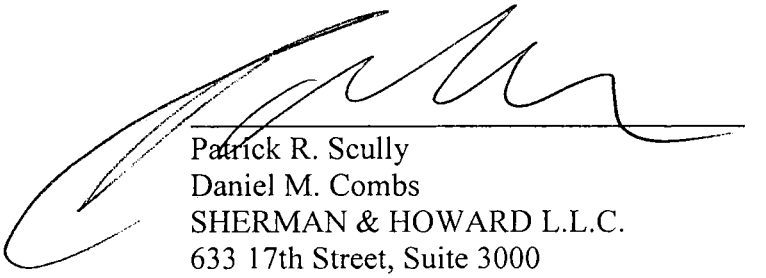
Petitioner's argument also fails to the extent it argues that the Board should not recognize an independent contractor designation that is made *solely* to avoid Union representation and in practice bares no relation to the common law agency factors. (Request for Review at 13.) The unsubstantiated suggestion that SuperShuttle DFW somehow designated the petitioned-for franchisees as independent contractors for nefarious reasons is contemptible and does not warrant review of the underlying Decision. The undisputed record evidence demonstrated two factors motivating the franchise structure: (1) compliance with FTC commercial franchise regulations (Tr. 35:25–36:6), and (2) the *franchisees*' desire to run independent businesses and have complete freedom over their schedules and revenue. (See id. 223:19–24, 247:11–16.) Indeed, the intent of *both* franchisees and SuperShuttle DFW to establish an independent contractor relationship could not be more clear in this case. (Decision at 19.) SuperShuttle DFW does not provide benefits to franchisees, SuperShuttle DFW does not provide withholding of any sort, several franchisees are corporations, and the intent of the parties to operate as independent contractors is clearly and repeatedly articulated in the UFA. (See Decision at 19–20.)

As with each of its arguments, Petitioner's assertion as to the supposed reason for the franchise structure is unconnected to the record. Similarly, Petitioner's assertions and theory of the case are based entirely on the holding and facts of another Region's decision, and, thus, are unsupported by facts. Given Petitioner's inability to present evidence in opposition to franchisees' independent contractor status, there is no basis to question the Regional Director's correct application of the law and the Board should not consider review.

III. CONCLUSION

For all of the reasons set forth above, SuperShuttle DFW opposes the Union's Request for Review of the Regional Director's Decision dated August 16, 2010. SuperShuttle DFW requests that the Board sustain the dismissal of the Petition.

Respectfully submitted this 3rd day of September, 2010.



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CERTIFICATE OF MAILING

I hereby certify that on September 3, 2010, a true and correct copy of the foregoing **SUPERSHUTTLE DFW, INC.'S STATEMENT IN OPPOSITION TO AMALGAMATED TRANSIT UNION LOCAL 1338'S REQUEST FOR REVIEW** was served to the following:

National Labor Relations Board (original and seven copies), via FedEx:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Fort Worth, Texas

SUPERSHUTTLE DFW, INC.
Employer

and **Case No. 16-RC-10963**

AMALGAMATED TRANSIT
UNION LOCAL 1338
Petitioner

DECISION AND ORDER

SuperShuttle DFW, Inc. is a Texas corporation engaged in the business of providing shared-ride services in the Dallas-Fort Worth area. Under Section 9(c) of the National Labor Relations Act, Petitioner filed a petition seeking to represent the certain employee classifications. The petition was amended during the hearing to reflect the following:

Included: SuperShuttle drivers (franchisees) and relief drivers.

Excluded: Supervisors, managers, dispatchers, as defined by the NLRA.

A hearing was held before a hearing officer of the National Labor Relations Board.[1] The Petitioner contends that the appropriate unit consists of approximately 89 employees, including 88 driver-franchisees (hereafter drivers) and one relief driver engaged in providing a shared-ride van service.

The Employer asserts that the bargaining unit is inappropriate upon two grounds. First, the Employer argues that the drivers are excluded from the Act's definition of

[1] Both the Petitioner and Employer filed briefs, which were carefully considered.

"employee" because they are independent contractors. Second, the Employer argues that if the drivers are not excluded as independent contractors, they should be excluded as statutory supervisors pursuant to Section 2(11) of the Act. Because I conclude that the drivers are independent contractors, I do not reach the issue of supervisory status.

I. ISSUE

The issues raised by the Employer are whether the drivers, who primarily serve the Dallas-Fort Worth (DFW) Airport, are independent contractors and whether the drivers are supervisors. For the reasons set forth below, I find that the drivers are independent contractors and not employees within the meaning of Section 2(3) of the Act. Because I find that the drivers are independent contractors, I will not address the Employer's alternative contention that the drivers are supervisors. To lend context to my discussion of the issue, I will provide an overview of the Employer's operations and historical background to the extent necessary for my discussion of the issues; a discussion of the statutory law and burdens of proof; and a statement of material facts and legal analysis.

II. FACTS

A. The Employer and Its Service

The Employer is SuperShuttle DFW. SuperShuttle DFW has a corporate relationship with SuperShuttle International and SuperShuttle Franchise Corporation, but is an independent entity. Other similarly named and affiliated companies operate in various cities throughout the United States. Together, the various SuperShuttle-affiliated

entities are involved to some degree in the business of providing transportation in the form of shared-ride shuttle service.[2]

The end product/service provided by the various SuperShuttle entities is a shared-ride service in which passengers are typically transported to or from DFW Airport or Love Field Airport. There are three basic way in which the service operates. First, the van may pick up or drop off multiple customers at multiple locations. For example, several customers may board a van at DFW Airport and ride together as each is dropped off at his/her respective destination. Similarly, several customers going to the airport may be picked up at their respective homes and thus ride together to the airport. Second, a "clear van" may be provided in which multiple customers are picked up or dropped off at the same location and no passengers are picked or dropped off at different locations (essentially the way a typical taxicab operates). Third, a van may pick up or drop off customers on a "hotel circuit." Under the third approach, multiple customers may be picked up or dropped off from multiple hotel locations on a fixed route (a basic shuttle service model of operation). In addition to the three usual ways in which vans operate, occasionally, a group of customers are transported to and from locations (neither of which is an airport), via a charter service.

B. Establishment of the Franchisee Relationship

Prior to 2001, SuperShuttle operated in the normal employer-employee relationship. Due to a significant drop in airline-related travel business following the effects of September 11, 2001, some of SuperShuttle's various affiliates began restructuring operations. SuperShuttle DFW moved to a franchisee-based model of

[2] As discussed below, the Employer disagrees with this characterization of its business and contends that it is in the business of selling franchise agreements that allow franchisees to provide transportation.

business in 2005. Under the new business model, the drivers sign a one-year Unit Franchisee Agreement (UFA). Most of the drivers sign in their own name, but 5 of the 88 drivers have signed as corporations. Before entering into a UFA, potential drivers must go through a disclosure process controlled by Federal Trade Commission franchise guidelines and pass a background check and drug test.

Under the franchise agreement, a driver, subject to certain restrictions, pays for the right to provide transportation to and from DFW and Love Field airports. The driver pays the Employer for this right by paying an initiation fee of $500 or $300[3] and a weekly payment of $575 to be paid 50 weeks per year ($28,750 a year). The weekly payment is a flat payment that is not affected by the revenue a driver generates. The weekly fee covers not only the franchise fee itself, but also the cost of providing the driver his Nextel device, by which he bids on routes, and marketing of the SuperShuttle brand.

The UFA states that the parties are not entering into an employer-employee relationship. Rather, the relationship between the parties under the UFA is a franchise-franchisee relationship. The UFA provides at one point, "persons who do not wish to be franchisees and independent business people but who prefer a more traditional employment relationship should not become SuperShuttle franchisees."

C. Drivers Obtain and Operate Vans

The driver is required to own or lease a van that meets the Employer's specifications, which include the make and model, color, size, age and mechanical condition of the vehicle. The vehicle must not be more than 7 years old, which the

[3] The $500 fee is for access to both DFW Airport and Love Field Airport, whereas the $300 fee is for access only to DFW Airport.

Employer contends is a requirement of DFW Airport. The van must display SuperShuttle's trademark blue and yellow combination and must be affixed with a large SuperShuttle logo. Although the mechanical condition is monitored both by the Employer and by the DFW Airport, including a 60-day check required by the Employer, the driver is responsible for all maintenance and the costs associated with maintenance.

A majority of the drivers own their vans and others lease-to-own their vans. Blue Van Leasing, a SuperShuttle-affiliated company, provides some of the drivers with vans on a three-year lease-to-own basis. The vans are valued between $15,000 and $30,000. One driver testified that his weekly lease payment is $178 per week ($9,256 per year).

The franchisee must purchase insurance through a designated insurer at $165 per week ($8,580 per year). Additionally, the franchisee must obtain certain licensing approval with the DFW Airport, which includes paying licensing fees and undergoing a background check. The driver must also complete training which, according to the disclosure document, consists of 34 hours of classroom training as well as 22 hours of on-the-job training.

D. Drivers Secure Fares and Receive Payments

In exchange for the fee provided to it, the Employer provides the franchisee with the right to bid on trips booked by customers. Additionally, the Employer provides the franchisee with a Nextel device by which the franchisee is offered and may secure trips. The franchisee is entitled to all fares paid by customers and does not share the fare with the Employer in any way. The weekly flat fee that the driver pays does not vary with revenues earned or any other factor.

Passengers may pay in the form of credit cards, vouchers, coupons or cash. Passengers may book their trips online, by calling an 800 number, at the SuperShuttle counter in an airport, through their hotel, or by approaching an idle driver. Drivers have a credit card reader onboard each van. On a weekly basis, drivers submit records of credit card payments from their own machines and confirmation numbers of passengers who paid online for reimbursement. The drivers must honor coupons, but are not refunded by the Employer for the discounted price. From funds processed on behalf of a driver, the Employer deducts money the driver owes (weekly franchise fee, insurance payment, vehicle payment, hotel circuit fees, etc) and then provides the driver with a reimbursement check.

According to the UFA, the driver has the option to purchase either an a.m., p.m. or a 24-hour license. However, the testimony reflected that no matter which license is purchased, the driver is actually unlimited in the hours during which he may operate. The driver may purchase a license that includes only access to and from DFW Airport or a license that includes access to both DFW Airport and Love Field Airport. The driver may provide service anywhere in the Dallas-Fort Worth area, and is limited in this respect only to the extent that the driver must meet the licensing requirements of the cities in which he provides service.

E. Drivers' Hours, Schedules and Bid Process

As previously noted, the driver may purchase certain types of licenses for specific schedules. However, a driver is under no obligation to work any certain days or hours, or even to work at all. A driver also may exceed scheduled hours if so desired. The stream of business is not steady, but is affected by broader economic factors as well as seasonal

cycles. To make up for slower times, one driver stated that he "work(s) like a wounded elephant" when customers are plentiful and could refrain from work during slow periods.

The Employer offers trips through Nextel hand-held devices. For the most part, drivers are free to either accept or decline an offered trip. If no driver accepts the trip the Employer sometimes puts the trip up for bid in a sedan service that it runs.[4] Occasionally, the Employer will combine the trip with a more lucrative trip. Finally, when "worst comes to worst," the Employer will call a taxi to transport the customer whose trip was not accepted. The record indicated that, on rare occasions, drivers are asked by a dispatcher to bid on a trip that no one else has accepted. Only one driver testified that he had found a trip forced into his Nextel device even though he had not accepted the trip. This occurred over one year ago and is the only reference in the record to a "forced bid."

The record reflects four ways in which drivers bid on trips. The first type of bidding is "available bidding." Available biding occurs when a driver is in some location that is not an airport or a hotel. In that case, a driver turns on his Nextel device and indicates that his services are available. The dispatch system, which because of GPS technology is aware of the driver's location, presents him with trips that customers have requested that are within a 20-mile radius. The first opportunity to bid is given to the nearest driver. The driver has a limited time to decide whether or not to bid on the trip. The driver makes the decision of whether to bid on or pass on the trip based on factors such as the amount of the fare, whether there are other trips to bid on in the area and the final destination of the trip. If the driver does not bid on the trip, the trip will be offered to another driver.

[4] No other details of the sedan service were provided.

The second type of bidding occurs when a driver is in a "hold-lot", such as when the driver is parked at DFW Airport, at a hotel, or some other location ("work-list bidding"). In that case, the driver who arrived first to the hold-lot, the hotel stand, or other location is presented with new trips out of the lot. The driver will assess the economics of the trip and decide whether or not to bid on it or to pass. If the first driver in the lot passes, the trip is offered to the next driver and so on.

Another type of bidding is "outbound finals bidding." In this case, the driver has indicated where his final destination will be based on a route that he has accepted. The system will then offer him trips originating in his final location.

Finally, there is "a.m. bidding." In this type of bidding, drivers log into the system during early morning hours (from approximately 1:00 a.m. to 5:00 a.m.) and bid on trips for later that morning. This system works on a first-come, first-serve basis rather than on proximity.

In addition to the four main bid systems, drivers may work the "hotel circuit." The "hotel circuit" is a system in which drivers and hotels negotiate among themselves a system to service the hotels. Drivers are not required to be involved in a hotel circuit and SuperShuttle is not involved in the organization of the hotel circuit. The drivers and the hotels involved craft by-laws and schedules for pick-ups. If a driver elects to participate in a hotel circuit, SuperShuttle deducts a fee of $60 from his weekly reimbursements. This fee is given to the hotels involved to cover costs associated with the hotel circuit. If a franchisee violates the bylaws of a hotel circuit he may be expelled from the circuit. The hotels and fellow circuit drivers are responsible for such an expulsion, not SuperShuttle.

Generally, a driver has no negative consequences for passing on a trip. However, once a driver accepts the trip by bidding on it, he may be fined by SuperShuttle in the amount of $50 if he cancels the trip. That $50 fee is awarded to the driver who bids on and is awarded the canceled trip.

F. Drivers' Pay and Expenses

Drivers are not guaranteed any pay or base salary. A review of two drivers' bidding history shows that the fares associated with the trips to be bid on generally range from $12-$160. The Employer's franchise disclosure shows the average gross revenue per shift in 2009. According to that disclosure form, 3 drivers averaged between $0 and $199 per shift and $37,024 in annual revenue, 17 drivers averaged $200-$249 per shift and $53,690 in annual revenue, 43 drivers averaged $250-$299 per shift and $51,743 in annual revenue, 35 drivers averaged between $300-349 per shift and $64,786 in annual revenue, and 12 drivers earned over $350 a shift (averaging $373 a shift) and $61,772 in annual revenue. The record reflects that cash tips and cash fares may not be accurately reflected in these figures.

Drivers pay for their own expenses, which include gas, tolls, licensing fees, and vehicle maintenance. Neither the testimony nor the disclosure statement provides an estimation of gas and vehicle maintenance expenses. As noted, drivers also purchase insurance through a SuperShuttle designated insurer.

G. Relief Drivers

The franchise agreements provide that the driver has the right to use a relief driver. The agreement requires that the driver provide written notice to the DFW Airport and that the relief driver must complete training with the DFW Airport. The record

reflects that only one driver currently employs a relief driver. The general manager testified that neither he nor any of the SuperShuttle staff direct relief drivers. Relief drivers are paid by the drivers directly. The relief driver testified that he entered into an agreement with a driver whereby the two rotate use of the van on an every-other-day basis. The two split profits earned above expenses. This agreement was one constructed by the two and the Employer is in no way involved in their arrangement. The record shows that in order to be hired as a relief driver, the relief driver had to gain the approval of the Employer and the licensing approval of DFW Airport.

The choice to hire the relief driver is made entirely by the driver (subject to approval by the Employer). The relationship may be terminated by either party at any time. A different driver testified that he had a relief driver at one point and that he had paid the relief driver $120 per shift and that the driver received all fares collected by the relief driver. The driver enjoyed the economic relationship, but the relief driver purchased his own van and franchise after three months. The relief drivers are required to undergo training provided by the Employer.

H. Other Provisions of the UFA

Under the UFA, a driver has the right to transfer his franchise, but may only do so subject to approval by the Employer. Among the conditions for approval is the condition that the transferee must meet all of the requirements of a new franchisee. Additionally, a payment of the lesser of $500 or 10% of the sale price must be made to the Employer for approval.

Further, the UFA provides that the Employer may terminate the contract with the driver if the driver associates or affiliates with a business that is competitive with the

Employer. It also specifies that the driver agrees to indemnify the Employer with regard to the Employer's legal liability if the driver's operation of his vehicle gives a third party rise to a claim against the Employer.

I. SuperShuttle's Contract with DFW Airport

SuperShuttle DFW is licensed to operate its services at DFW Airport by virtue of a contract entered into between it and the DFW Board, a public governmental agency. The terms of the contract entered into between SuperShuttle DFW and the DFW Board describe the way in which SuperShuttle DFW may operate its business. Testimony at hearing indicates that the 130-page documents has extensive terms which describe most of the ways in which SuperShuttle will run its DFW Airport operation. The requirements include that the Employer maintain a customer complaint procedure, screen its drivers for drugs and alcohol, and train its drivers. Additionally, the terms prohibit a driver from either leaving his vehicle or performing maintenance on his vehicle while parked at DFW Airport. The contract governs the marking on the vans as well as their internal conditions and the number of seats that a van may offer and calls for vehicle maintenance and a post-accident safety inspection. The contract provides DFW Airport with the right to inspect vans operated by SuperShuttle as well as to audit SuperShuttle for compliance with the contract.

The contract provides a procedure for customer complaints. Under this procedure, SuperShuttle must provide a response to customer complaints within 10 days and send a copy of all complaint related correspondence to a DFW Airport official. Additionally, SuperShuttle must provide a quarterly summary of complaints and complaint handling.

III. ANALYSIS

As the facts above reflect, the parties here do not have a typical employment relationship and the issue of whether the drivers are employees requires analysis. Based on the foregoing facts and as set forth below, after careful consideration of all aspects of the relationship between the drivers and SuperShuttle, I find that the drivers are independent contractors and not employees under the Act.

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." Accordingly, if the drivers in the instant matter are independent contractors rather than employees as defined in the Act, they are excluded from the Act's protections. Because such a classification would result in the loss of the Act's protection, the burden is on party asserting independent contractor status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). The Supreme Court held that Congress intended that the common law agency definition be applied to the term "independent contractor." *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968). Thus, the common law test of agency as described in the *Restatement (Second) of Agency* has been and continues to be the standard by which the Board and the courts analyze an individual's inclusion or exclusion in the Act's protection. *Arizona Republic*, 349 NLRB 1040, 1042 (2007), citing *Restatement (Second) of Agency* § 220(2).

A. The Ten Restatement Factors For Independent Contractors

The *Restatement* lists ten non-exhaustive factors in determining independent contractor status. However, the Supreme Court cautioned that there is no "shorthand formula" or "magic phrase" and "all incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Insurance Company of*

America, 390 U.S. at 258. In recent years, the Board has also found that entrepreneurial opportunity for gain or loss on behalf of the worker should be considered. See *Roadway Package System*, 326 NLRB 842, 850 (1998) and *Express Delivery Systems*, 332 NLRB 1522, 1526 (2000) enfd. 292 F.3d 777 (D.C. Cir. 2002). Furthermore, the D.C. Circuit has called entrepreneurial opportunity an "animating principle by which to evaluate" the other factors in cases where factors weigh on both sides. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009), reh'g denied, reh'g en banc denied (D.C. Cir. 2009). I will discuss the factors listed by the *Restatement* as well as the entrepreneurial factor below. Finally, I will address the factors in the aggregate.

As discussed above, the *Restatement (Second) of Agency* Section 220 lists 10 factors to be considered in the determination of common law independent contractor status. Those factors are: (1) the extent of control; (2) whether the employed person is engaged in a distinct business; (3) whether the occupation in question normally requires supervision; (4) the skill required by the occupation; (5) who supplies the tools or instrumentalities of work; (6) length of employment; (7) method of payment; (8) whether the work performed is in the business the employer is engaged in; (9) the intent of the parties' when entering the relationship; and, (10) whether the principal is a business. The trier of fact must determine whether "a sufficient group of favorable factors [exists] to establish the employee relationship." *Roadway*, 326 NLRB at 850.

(1) The extent of control which, by the agreement, the master may exercise over the details of the work

The right-of-control is one of the most important factors in any industry, but the Board has held that the control exerted by an employer "over the manner and means by which the drivers conducted business after leaving [the company's garage]" is one of two

factors given significant weight in the taxicab industry. *AAA Cab Services*, 341 NLRB 462, 465 (2004). Because the shared-ride industry is an extension of the taxicab industry, this factor should be afforded significant weight.

In the instant case, drivers are free from control by the Employer in most significant respects in the day-to-day operation of their vans. Drivers are free to work if and when they want, and have total autonomy in this respect. Drivers do not need to even commit to a schedule of their own creating. Drivers simply indicate if they are available and decide whether or not to accept trips. Other than the receipt of data from the Nextel device, there is little record evidence of communication between a driver and the Employer in the driver's day-to-day operation of his/her van. It is well settled that a driver's discretion in deciding if and when to work and which trips to accept weighs in favor of a lack of control. *AAA Cab Services*, 341 NLRB at 465.

In addition to the foregoing factors reflecting a limited exercise of control by the Employer, the record also reflects that drivers are largely free in where they will work. Although they may be limited to the extent that they are confined to the Dallas-Fort Worth area, which is what their licenses provide, the Employer does not otherwise control where the drivers will perform the work. Id. (freedom in geographic area weighed toward finding of independent contractor status).

As noted above, the record reflects that the Employer may fine a driver $50 for instances when he/she accepts a trip and then later decline the trip. The $50 is given to the driver who accepts the previously declined trip. Additionally, Petitioner presented evidence that, in one instance, the Employer forced a trip into a driver's Nextel and that when the driver declined the trip, the Employer fined the driver $50. This incident is the

exception as it was the only example provided on the record. Although the franchise agreement contains a provision by which the Employer may discipline drivers through a point system, no testimony was presented that the point system has been utilized. The fact that the Employer may fine a driver who declines service to a customer that he has previously committed to servicing does not demonstrate employer control sufficient to support a finding that an individual is an employee under the Act.

The fact that the parties have contracted for the driver to indemnify the Employer also reflects a lack of control or at least a lack of a motivation to control. That is, in an ordinary employment relationship, the employer has an incentive to control the employee's work in that he may be liable for harm caused. The indemnification clause here is an attempt to avoid that liability and weighs toward a finding of lack of control by the Employer. See *Dial-A-Mattress*, 326 NLRB 884, 891 (1998) ("in employer-employee relationships, employers generally assume the risk of [] third-party damages, and do not require indemnification from their employees").

The drivers are not free in all details of the work. Although they are free to accept or reject trips, they are not free to set their fares or reject coupons. Neither are they free to choose their own attire, rather they must dress in uniform and maintain certain grooming standards. See *AAA Cab Service*, 341 NLRB at 465; *Argix Direct*, 343 NLRB 1017, 1022 (2004).

Furthermore, the Employer exercises some degree of control over the drivers by inspecting their vehicles, and monitoring their driving by affixing a "How am I driving?" sticker to their vehicle, installing GPS tracking devices on the vehicles, and requiring that the drivers submit records of their trips and fares. Additionally, the Employer has a cell

phone policy which requires the drivers to refrain from cell phone use while driving and requires that drivers undergo some, but not extensive training. The Employer also requires that drivers carry insurance. Additionally, although drivers are required to drive a specified make and model of vehicle (not to exceed seven years old), this requirement is not mandated by the Employer but by DFW Airport. Furthermore, the Employer requires that the vehicles must be painted to specification and bear the Employer's logo. Although these vehicle requirements demonstrate some degree of control on the drivers' decisions in vehicle purchase and selection, they do not demonstrate control "over the manner and means" by which the drivers conducted the actual business of transporting customers. See, e.g. *AAA Cab Services*, supra. (fact that taxicabs were painted according to trade name not discussed in determining that employer's lack of control regarding operations of taxicabs).

Based on the foregoing, I find that the factors of control favor that the drivers are independent contractors. The factors strongly favoring control include scheduling and selecting fares.

(2) Whether the one employed is engaged in a distinct occupation or business; (8) Whether the work is a part of the regular business of the employer; and (10) Whether the principal is or is not in business

These factors are closely related. Certain specialized occupations are commonly performed by individuals in business for themselves and therefore if the employed person is in such an occupation, this factor will weigh toward independent contractor status. However, occupations without such an association are not deemed distinct. See *Bailey Distributors*, 278 NLRB 103, 115 (1986), order vacated on other grounds, 796 F.2d 14 (2nd Cir. 1986) (driver-salesman's helper not engaged in distinct occupation). A van

driver is not a distinct occupation and so this factor weighs in favor of an employee status classification.

The Employer argues that it is not engaged in the business of transportation, but rather in the business of franchising and providing services to franchisees. That the Employer and its various affiliated companies are in the business of marketing transportation and selling transportation is clear. Whether the company directly profits when the actual transportation is provided is secondary to the fact that its revenue is ultimately derived from the transportation it markets and sells. See *Arizona Republic*, 349 NLRB 1040, 1046 (2007) (delivery of newspapers an integral part the newspaper business). Therefore, these factors weigh in favor of an employee classification.

(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision

As no evidence was presented by the Petitioner as to whether van drivers are typically supervised in their work, this factor favors independent contractor status.

(4) The skill required in the particular occupation

The record does not illustrate that the drivers need to have any particular skill or require any specialized training, other than a specific driver's license. Therefore, this factor weighs in favor of an employee classification. *Prime Time Shuttle International, Inc.*, 314 NLRB 838, 840 (1994) (shared ride van drivers did not have particular skill).

(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work

Three major supplies or instrumentalities are at issue: the vans; the Nextel devices; and, the uniforms. The drivers are responsible for owning or leasing a van, the Employer provides the Nextel devices as part of the franchise agreement, and the

Employer provides one uniform while the drivers buy additional uniforms. The Nextel devices are equipment that the drivers pay for as part of their weekly payments. Consequently, they are equipment in which the drivers have a proprietary interest. *See AAA Cab Services*, supra at 465 (paying leases or rental fees over time results in an investment on the part of the renter/lessee). The van is the most expensive of these instrumentalities and this factor weighs in favor of an independent contractor classification. *Argix Direct, Inc.*, 343 NLRB at 1020; *Dial-A-Mattress*, 326 NLRB 884 (employer provided owner-operators with two-way radios, credit card machines, and spare bed frames, but most costly piece of equipment, the truck, was owned by owner-operators). Compare *Community Bus Lines/Hudson County Executive Express*, 341 NLRB 474 (2004) (drivers who drove vans owned by the employer were not independent contractors).

(6) The length of time for which the person is employed

When the length of time of employment shows a relationship that is more permanent than passing, this factor weighs in favor of a finding of employee classification. Because the franchise agreements have a definite one-year period, this factor does not weigh in favor of an employee relationship, where the relationship is typically indefinite, and instead favors a finding of independent contractor status. *See St. Joseph's News-Press*, 345 NLRB 474 (2005).

(7) The method of payment, whether by the time or by the job;

Form of payment is the other of two factors that the Board has given significant weight to in the context of the taxicab industry. *AAA Cab Service*, 341 NLRB at 465. Where "the lack of any relationship between the company's compensation and the

amount of fares collected" exists, this factor weighs in favor of a classification of independent contractor. Id. When an employer and a driver share in the profits of the driver's fares, the employer has a motive to keep the driver working and working efficiently. *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1309-1310 (2004). Thus, a fare-sharing employer has a motive to control the manner and means of the driver. Id. However, such a motivation is lacking here because the Employer does not share in the profits and the fares collected. Therefore, this factor weighs in favor of classifying drivers as independent contractors. Id.

(9) Whether the parties believe they are creating the relation of master and servant

Three points here favor finding that the drivers are independent contractors. First, the contract specifies that the parties were entering into a non-employee relationship. Such a contract term weighs in favor of independent contractor status. *Arizona Republic*, 349 NLRB at 1045; *St. Joseph News Press*, 345 NLRB at 479. Second, the Employer does not provide drivers with any type of benefits, which also favors independent contractor status. The Employer also does not provide withholding of any sort. Id.

Third, five of the drivers have signed their franchise agreements as corporations. By incorporating, these employees have clearly evinced a belief that they are not in an employer-employee relationship. Such a corporate status is unusual in the employment relationship and tends to be associated with a finding of independent contractor status. These factors, therefore, demonstrate that the drivers and the Employer did not intend to enter into a traditional master-servant relationship, which favors a finding of independent contractor status.

B. Other Factors

Case law also demonstrates that others factors, such as lack of bargaining power and entrepreneurial opportunity for gain or loss, must be considered. These factors will be discussed below.

(1) Lack of bargaining power

The terms and conditions of the UFA are unilaterally promulgated by the Employer, a factor which weighs in favor of an employee status. *Argix Direct*, 343 NLRB at 1020. However, bidding on fares demonstrates that the drivers have some bargaining power.

(2) Entrepreneurial Opportunity for Gain or Loss

This factor strongly favors finding that the drivers are independent contractors because the drivers' decisions and efforts impact their income, which provides them with opportunity to gain as well as to lose.

Because of their contractual obligations, the drivers have opportunity for loss. Here, in addition to making payments for their vehicles, the drivers are obligated to pay almost $30,000 per year to the Employer and another $8,500 in insurance. Thus, this relationship is quite different from the ordinary employment relationship, as a driver who cannot work or whose vehicle cannot function may still accrue these costs. In fact, the franchise disclosure agreement shows that the lowest earning drivers in 2009 averaged only $37,024. When factoring in gas, car payments, maintenance, licensing fees, tolls and other costs, the amounts of which were not disclosed in the record, the operation of a franchise provides a risk of loss. Therefore, entering into a franchise agreement

demonstrates a significant propriety investment in the work. *AAA Cab Services,* 341 NLRB at 461-462.

Drivers make calculated choices between which trips to choose. The fact that the drivers pay for their gas, tolls, and vehicle expenses weighs in favor of independent contractor status. *Dial-A-Mattress*, 326 NLRB at 891 (owner-operators not provided with a fuel subsidy or maintenance support). Because the drivers pay for the costs of operating their vans, their decisions in choosing trips impact their profit margin. Similarly, a driver's determination of when and how much he will work impacts his profit margin. All drivers take similar risks, but by their decisions and efforts, they do not all achieve the same profits. Thus, they have entrepreneurial opportunity and risk.

The drivers may hire relief drivers. If a driver hires a relief driver, he pays him out of his own earnings. The drivers therefore have potential to generate more gross revenue while spending less time driving when a relief driver is hired.

Based on the foregoing, because the drivers make expenditures and take on obligations that may result in either loss or gain, the entrepreneurial factor weighs strongly in favor of finding independent contractor status.

C. Weighing The Factors

Based on the foregoing, I find that the weight of evidence favors a finding that the drivers herein are independent contractors. .Similar to the taxicab industry, significant factors herein include the lack of control exerted by the Employer and the lack of sharing of fares. *AAA Cab Service*, 341 NLRB at 465. Here, drivers do not share their fares with the Employer and drivers operate their vehicles with little Employer control. Additionally, significant weight is given to the belief and intent of the parties in entering

into relationships, and that factor clearly favors a finding of independent contractor status. Finally, I find that the drivers' ownership of their vehicles as well as their opportunities for loss and gain are significant factors in establishing that drivers are independent contractors. I therefore conclude that the drivers are independent contractors and are excluded from the Act.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding and in accordance with the above discussion, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.[5]

3. The Drivers (Franchisees) are independent contractors and not employees under the Act.

V. ORDER

The Undersigned hereby ORDERS that the petition filed in this matter is dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-

[5] The parties stipulated, and I, find that the Employer is a Texas corporation with a place of business in DFW Airport, Texas. During the past twelve months, a representative period, the Employer purchased and received at its DFW Airport location goods and services valued in excess of $50,000 directly from points located outside the State of Texas.

0001. This request must be received by the Board in Washington by **August 30, 2010.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[6] but may not be filed by facsimile.

DATED at Fort Worth, Texas this 16th day of August 2010.

/s/ Ofelia Gonzalez

Ofelia Gonzalez, ActingRegional Director
National Labor Relations Board
Region 16
Room 8A24 Federal Office Building
819 Taylor Street
Ft. Worth, Texas 76102-6178

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[6] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

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